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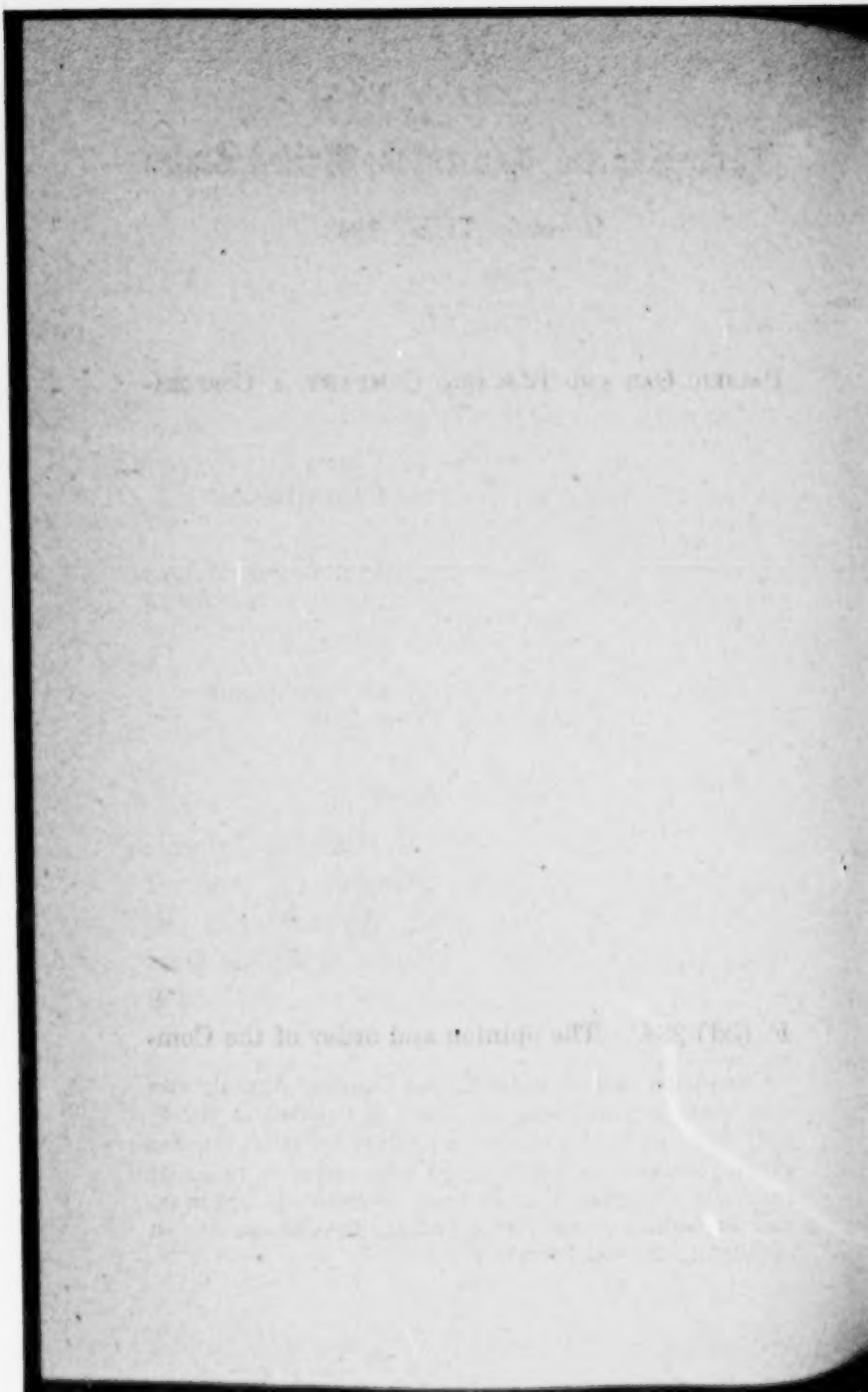

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 873

PACIFIC GAS AND ELECTRIC COMPANY, A CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the Circuit Court of Appeals (six judges participating) affirming the order of the Commission by an equally divided court (R. 1741), and the dissenting opinion of Judges Garrecht and Matthews (R. 1741), are reported in 139 F. (2d) 298.[1] The opinion and order of the Com-

[1] An earlier opinion in the Circuit Court of Appeals with only three judges sitting (R. 1699) is reported in 127 F. (2d) 378. After this opinion a petition for rehearing was granted and the case was reargued before all seven judges of the Ninth Circuit sitting *en banc*. Between the argument and the decision Judge Haney died and the affirmance by an equally divided court resulted.

mission (R. 1883), dated September 10, 1941, is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on November 18, 1943 (R. 1776). A petition for rehearing was denied February 23, 1944. (R. 1777.) The petition for a writ of certiorari was filed on April 10, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935.

QUESTIONS PRESENTED

1. Whether the determination of the Securities and Exchange Commission that petitioner had not shown that its management or policies were not "subject to a controlling influence" by The North American Company within the meaning of the exemption provision of Section 2 (a) (8) of the Public Utility Holding Company Act was unsupported by substantial evidence or without a reasonable basis in law.

2. Whether, as applied to a self-operative order denying an application under Section 2 (a) (8) of the Public Utility Holding Company Act of 1935, the court below, being equally divided, was warranted in entering a decree leaving in effect the order of the Commission.

STATUTE INVOLVED

Section 2 (a) (8) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 807, 15 U. S. C. 79b (a) (8)) is set forth in the Appendix, *infra*, pp. 28–30.

STATEMENT

The petitioner, Pacific Gas and Electric Company ("P. G. & E."), an exempt holding company,[1] is predominantly an electric and gas utility company (R. 45–100). As of the date of its application for an order declaring it was not a subsidiary of The North American Company ("North American"), the latter company owned 32.89% of P. G. E.'s common stock, constituting 17.71% of P. G. & E.'s outstanding voting securities[2] (R. 75).

Since more than 10% of P. G. & E.'s outstanding voting securities are owned by North Ameri-

[1] Concurrently with the filing of its application for an order declaring it was not a subsidiary of The North American Company, petitioner filed an application pursuant to Section 3 (a) (1) and (2) of the Act for an exemption as a holding company with respect to its ownership of 45.8% of the voting securities of Vallejo Electric Light and Power Company, an electric utility company operating in Vallejo, California. This application was granted.

[2] Since the date of the Commission's order, North American has distributed some of petitioner's common stock as dividends; as of the present time, it owns approximately 14.21% of petitioner's voting securities. North American has committed itself to a program of systematic disposition of its P. G. & E. stock. It is also under order to dispose of that stock and it urged no error in that determination except the general constitutional question now pending on a special calendar in this Court.

can, it is a "subsidiary company" of North American under Section 2 (a) (8) (A) of the Act, unless, under the second paragraph of that Section, the Commission should enter an order declaring it not such a subsidiary. P. G. & E. filed an application under that paragraph requesting the Commission to declare that it was not a subsidiary of North American. (R. 2, 45.) The application was denied by the Commission on the ground that P. G. & E. had not sustained the burden of proving that its management or policies "are not subject to a controlling influence" by North American within the meaning of clause (iii) of that paragraph. The findings and opinion of the Commission may be summarized as follows:

P. G. & E., a California corporation organized in 1905, is primarily engaged in the production, purchase, transmission, distribution and sale of electric energy and natural and manufactured gas in northern and central California. As of June 30, 1940, it had assets per books of $791,146,218 (Pet. Ex. 36). For the year ended December 31, 1939, it had gross operating revenues of $107,175,353 (R. 94). As of August 1, 1940, it had the following securities outstanding (R. 74):

First and Refunding Mortgage Bonds	$277,681,000
Assumed bonds issued by San Joaquin Light and Power Company	9,082,000
6% Cumulative preferred stock—4,197,659 shares of a par value of $25 each	104,941,475
5½% Cumulative preferred stock—1,173,163 shares of a par value of $25 each	29,329,075
Common stock—6,261,273 shares of a par value of $25 each	156,531,825
Total	577,515,375

As of the last mentioned date, North American owned 2,059,670 shares of the common stock which ownership represented 32.89% of that class of security and 17.71% of the outstanding voting securities (R. 75). The next largest stockholder, Standard Gas and Electric Company, owned, as of the same date, 200,420 shares of the common stock or 1.72% of the voting securities (R. 75). Generally speaking, the remainder of P. G. & E.'s voting securities are widely scattered among its 96,091 stockholders (Pet. Ex. 20 and 29).

North American's interest in P. G. & E. dates back to 1930. In June of that year, P. G. & E. exchanged 1,825,000 shares of its common stock for certain securities of three public-utility subsidiaries of Western Power Corporation, a sub-holding company in the North American system, and the cancellation of certain indebtedness owed by these subsidiaries to their parent. (Pet. Ex. No. 6; R. 1051–1053.) In 1931 Western Power Corporation purchased 252,055 additional shares of P. G. & E.'s common stock. Upon the dissolution of Western Power Corporation, its holdings of the common stock of P. G. & E. were acquired by North American (Comm. Ex. 56, 57 and 58).

At the time of the 1930 transaction, there was an oral agreement that North American would be entitled to name three directors on P. G. & E.'s board of fifteen and one member of its executive committee (composed of four directors and the President of the company) (R. 1059–1062, 1123).

According to several of the local directors, there was a general understanding between the persons representing P. G. & E. and North American that North American would not interfere with the management of P. G. & E. (R. 225–226, 456–457, 602–605, 675, 688, 881, 947–948, 960–961).

Pursuant to this oral agreement, James B. Black, then a vice-president of North American, Guy C. Earl, a former president of Great Western Power Company of California, and Edwin Gruhl, then vice-president and general manager of North American, were elected to P. G. & E.'s board on June 18, 1930. Black was also appointed to the executive committee but was replaced in a few weeks by Earl. (Pet. Ex. 16 and 17.)

Earl served continuously as a director and member of the executive committee until his death in June 1935. During this period he attended substantially all of the meetings of these two bodies, and took copious notes of what transpired, which he sent to Black together with copies of the minutes of the meetings of the executive committee and various reports which were furnished directors and executive committee members. (Pet. Ex. 19, R. 276, 1154–1155.) For these services, North American paid Earl $12,000 a year (R. 1440). During this period one of Black's principal duties as an employee of North American was the maintenance of careful scrutiny over the affairs of P. G. & E. (R. 1157–1158).

Upon the death of A. P. Rockefeller, P. G. & E.'s president, in November 1933, the executive committee, which then consisted of three San Francisco business men, decided to recommend to the board of directors Black's election as president (R. 611–612, 633–635). After several conferences with local non-employee directors, C. O. G. Miller, one of the executive committee members, called Fogarty of North American and obtained permission to offer the position to Black (R. 613–615, 633). Miller then called Black, who agreed to accept the presidency if elected (R. 634–635). At the insistence of another director, Miller called Black a second time and asked him whether, if elected president, Black would sever all his relations with North American. Black replied in the affirmative. Shortly thereafter, Black was elected to the presidency. (R. 611–616, 633–635, 738–742, 1442–1445.) After Earl's death and Black's selection as president, North American did not appoint a representative to the board or to the executive committee in Earl's place. The other two representatives have attended practically no meetings and no one was ever selected to perform the duties performed by Earl. (R. 1155, 1473; Pet. Ex. 16 and 18.) North American's present representatives on P. G. & E.'s board are J. F. Fogarty, Chairman of the executive and finance committees of North American, and H. C. Free-

man, Vice-president of North American (R. 1901; Pet. Ex. 16).

None of P. G. & E.'s other large stockholders is represented on its board.*

For many years, P. G. & E.'s proxy committee has consisted of its president, vice-president and general manager, and secretary and treasurer. (R. 1088–1089). The proxy committee has customarily solicited proxies for the incumbent directors including North American's representatives. North American has always sent its proxy to the proxy committee. (R. 1581–1582.)

Under the corporation laws of California, the presence in person or by proxy of the holders of the majority of the shares entitled to vote constitutes a quorum and if a quorum is not present a majority of the shares in attendance may adjourn the meeting but no other business may be transacted (R. 1898). Since 1932 (until April 9, 1940) at no meeting were enough shares present, apart from the shares held by North American to constitute a quorum (R. 1898–1899). North American's holdings have represented from 28 to 30 per cent of the total votes cast at each

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* The Commission noted the possibility that C. O. G. Miller, chairman of the board of Pacific Lighting Corporation, which owns 131,900 shares of P. G. & E.'s common stock, might be considered a representative of that company, but indicated that he was not generally so regarded (R. 1901).

of the stockholders' meetings held during the period (Pet. Ex. 23).

In addition to reports ordinarily sent to directors P. G. & E. sends to Fogarty or Freeman every week the following reports, which are submitted otherwise only to members of the executive committee (Pet. Ex. 33 and 45 (R. 1908)):

(1) Cash reports showing collections and disbursements;

(2) Expenditures authorized under general manager estimates submitted to the executive committee for approval;

(3) System generating report showing power output, system peaks and precipitation data;

(4) Consolidating operating report of the Natural Gas Division of gas received and gas sent out;

(5) Statement of new business connected, electric and gas;

(6) Minutes of meetings of the executive committee.

P. G. & E. sends monthly to Fogarty or Freeman, the following reports, which are submitted to members of its executive committee or to its directors (R. 418–425, 749, 1908–1909):

(1) Customers' statement showing gain or loss in customers by departments and divisions;

(2) Capital expenditures statement showing gross capital expenditures and property retired, work in progress, general

manager estimates transferred to plant account, capital expenditures covered by division managers' authorization, and status of purchasing department contracts;

(3) Consolidated income statements in comparative form—month, year to date, and 12 months to date, with supplementary statement showing revenue and expenses by major departments, accounting classifications, and geographical divisions;

(4) Consolidated balance sheets in comparative form, with supporting schedules showing outstanding stocks and bonds, together with income statements and supplementary statistical data.

P. G. & E. also regularly sends the following material to Fogarty or Freeman, although such material is not furnished either to its directors or the members of its executive committee (R. 1909):

(1) Minutes of meetings of the board of directors;

(2) Copy of report submitted to the Edison Electric Institute, showing sources and disposition of electric energy and classifications of customers;

(3) Copies of gas and electric rate schedules, revised from time to time by the filing of new schedules with the California Railroad Commission;

(4) Copies of "Report for Insurance Companies" prepared annually and sent to large insurance companies and other institutional investors;

(5) Statistical statements prepared by the Department of Vice President and Executive Engineer;

(6) Rate schedules filed with the California Railroad Commission;

(7) Court decisions and orders of the Railroad Commission of interest to P. G. & E.

North American has never requested any information from P. G. & E. which has not been furnished.

Black and Fogarty have called each other by telephone from four to nine times each year since Black became president. Their conversations were with regard to the bond market, settlement of a rate case, and contemplated refundings. (R. 1162–1163, 1446.) Black has been in New York twice and Fogarty in San Francisco four times since 1935. On each of these occasions Fogarty and Black discussed petitioner's affairs in a general way. (R. 1080, 1484–1487.) In connection with public financing by P. G. & E., Black talked to Fogarty on the telephone to obtain his opinion on the bond market (R. 1273–1274, 1537). He also sought Fogarty's advice as to discounts in connection with a later sale to institutional investors of a $15,000,000 bond issue (R. 1289).

North American has never performed any services for P. G. & E. and, other than the payment and receipt of dividends, has never had any monetary transactions with P. G. & E. (R. 228, 525, 545, 1083, 1582).

The record shows only one occasion, prior to the time when Black became president, when North American's wishes on a particular matter were contrary to the action of P. G. & E.'s directors. In 1933, on the recommendation of Hockenbeamer, the directors reduced the dividend on the common stock. North American's president called Hockenbeamer and requested that the matter be reconsidered. The matter was not reconsidered. (R. 670, 639–641, 870–871, 1067–69.)

The record also contains testimony, not challenged by the Commission, that petitioner's local directors are men of substance with a keen sense of local pride in their community. In addition there were of course protestations on the part of both P. G. & E. officials and of North American officials as to the absence of control or controlling influence.

On the basis of this record the Commission determined that P. G. & E. had not sustained the burden of proving that its management and policies were not subject to a controlling influence by North American. The Circuit Court of Appeals affirmed, at first by a two to one decision (R. 1699–1738), and then, upon reargument before the court *en banc* (R. 1739–1740), by an equally divided court (R. 1741).

ARGUMENT

1. Since more than 10 percent of petitioner's outstanding voting securities are owned by

North American, petitioner is a "subsidiary company" of North American under Section 2 (a) (8) (A) of the Act. The Commission cannot enter an order declaring that petitioner is not a subsidiary company of North American unless it finds that petitioner complies with the three statutory conditions contained in the second paragraph of Section 2 (a) (8), *infra*, p. 29.[5]

The Commission was unable to find that petitioner had satisfied the third of these conditions, that petitioner's management and policies are not "subject to a controlling influence" by North American "so as to make it necessary or appropriate in the public interest or for the protection of investors and consumers" that petitioner be regulated as a subsidiary of a registered holding company.[6]

The question whether petitioner came within the quoted language was one to be determined by the Commission, and the facts found, and factual inferences made by, the Commission are binding upon the courts so long as they have "warrant in

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[5] *Detroit Edison Co.* v. *S. E. C.*, 119 F. (2d) 730, 739 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey* v. *S. E. C.*, 129 F. (2d) 899, 902 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co.* v. *S. E. C.*, 129 F. (2d) 794, 796 (C. C. A. 2d); *American Gas and Electric Company* v. *S. E. C.*, 134 F. (2d) 633 (App. D. C.), certiorari denied, 319 U. S. 763; *Koppers United Co.* v. *S. E. C.*, 138 F. (2d) 577 (App. D. C.).

[6] The Commission deemed it unnecessary to consider the question raised under clauses (i) and (ii) of Section 2 (a) (8) since the petitioner did not meet the conditions of clause (iii). These clauses are set out in the Appendix, *infra*, p. 29.

the record and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, No. 336, p. 15; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146; *Gray* v. *Powell*, 314 U. S. 402; *National Labor Relations Board* v. *Southern Bell Tel. & Tel. Co.*, 319 U. S. 50. This was an issue of fact not in any material respect different from that in any of the other cases which have arisen under Section 2 (a) (8) of the Act.[7]

Although the record reveals no instance when North American has affirmatively directed petitioner's management or policies, the record clearly sustains the conclusion that this lack of interference was deliberate and due to North American's satisfaction with the manner in which petitioner's affairs were being conducted (R. 1545–1548, 1642–1643). Apart from the fact that it was in the interest of good "public relations"

[7] As in those cases (see note 5, *supra*) the problem for the Commission here was essentially that of weighing objective evidence of control or controlling influence. This evidence included undisputed evidence as to the amount and character of the concentrated voting rights held and exercised by the parent company as compared with the rights held and exercised by others and the extent that the public holdings might be diffused among numerous scattered investors—against which were opposed the otherwise uncontradicted protestations of company witnesses as to the absence of the practical effects that would normally be expected from such holdings. As the Commission's opinion indicates (R. 1919, 1920, 1928 fn. 27), the facts indicative of controlling influence are in some respects stronger and in some respects weaker than in the cases previously decided.

(R. 1642, 1922) for petitioner to be regarded as a local company, it should be noted that the whole period since Black became president in November of 1935 is the period since the passage of the Holding Company Act, when both petitioner and North American were interested in avoiding the legal status of a subsidiary for petitioner. It is not surprising therefore that there was an avoidance of unnecessary participation by North American in the formal deliberations of petitioner's management. The importance of North American's investment in petitioner's common stock is shown by the fact that the investment is carried on its books at approximately $63,000,000 and the dividend income therefrom represents from 20% to 25% of its corporate income. Since no other stockholder of petitioner owns as much as 2% of its voting securities, North American would be a formidable opponent were it to engage in a proxy fight with the local directors.* Regard-

*Since the preferred stockholders of P. G. & E. have had an uninterrupted record of receiving their fixed preferential dividends, which are currently being earned by a substantial margin, they are far less likely than common stockholders to evidence an interest in managerial problems. For that reason the concentration of North American's holdings in the common stock and its 32.89% interest in that stock is particularly significant in considering a possible contest over control. In appealing for the support of fellow stockholders North American would have the advantage of being able to point to many years of experience in the public utility field, to the close study given by its officers to petitioner's affairs, and also to its own tremendous stake in the earnings of petitioner.

less of whether its efforts to oust the local management would be successful, its initial advantage would be a potent factor in influencing that management to accede to requests which North American might make.[9] Furthermore, the concentration of voting power in North American makes it virtually impossible for any other interest or group of interests to elect a majority of the directors. Indeed, without North American's acquiescence petitioner would not even have had a quorum for the conduct of an annual meeting in any year since 1932 (R. 1898, 1899.).

The Commission also considered significant the position of Black, P. G. & E.'s president. After Black's election as president, North American was willing to forego representation on petitioner's executive committee and to reduce its representation on petitioner's board from three to two. For eight years prior to becoming presi-

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[9] As stated in *Detroit Edison Co.* v. *S. E. C.*, *supra*, note 5, at pp. 738–739: "The present Act undertakes to bring within its ambit all subsidiaries subject to 'controlling influence' of a parent. This phrase should be construed in the light of the purpose of the Act of which it is a part, and when understood in this setting and in the light of its ordinary signification, it means the act or process, or power of producing an effect which may be without apparent force or direct authority and is effective in checking or directing action, of exercising restraint or preventing free action. The phrase as here used, does not necessarily mean that those exercising controlling influence must be able to carry their point. A controlling influence may be effective without accomplishing its purpose fully."

dent of P. G. & E., Black was a senior executive officer of North American and considered one of its most capable men. During the years 1930 to 1935, he, more than any other person in North American's organization, kept in close touch with petitioner's affairs and was responsible for looking after North American's investment in that company. In view of Black's association with North American, the Commission thought it unlikely that he would treat any suggestions that company might make as carrying no more weight than those of any stockholder.

The experience of the Commission in this field especially qualified it to draw the conclusion of ultimate fact as to whether these considerations gave North American a "controlling influence" over petitioner,[10] and its judgment was not unreasonable, or without warrant in the record or basis in the law.

2. Petitioner contends that the Commission misconstrued the Act. It intimates that the Commission's decision is that the application was denied "irrespective of whether in fact Pacific Gas is subject to its [North American's] 'controlling influence' ". (Pet. p. 3.) But this has never been the Commission's position, as is apparent from its opinion (R. 1883–1931) and its conclusion that (R. 1928): "* * * we hold

[10] *National Labor Relations Board* v. *Hearst Publications, Inc.*, No. 336, p. 15; *Gray* v. *Powell*, 314 U. S. 402.

that applicant has not sustained the burden of proving that it is not 'subject to the controlling influence' of North American within the meaning of Section 2 (a) (8)." [11]

The ownership of more than 10% of the voting stock of P. G. & E. by North American placed P. G. & E. presumptively in the class of a subsidiary, subject to being removed from that category upon a proper showing that it was not subject to a "controlling influence" by North American. The Commission did not, as petitioners contend (Pet. p. 26), treat ownership of more than 10% of the voting stock by North American as being, "in and of itself, sufficient ground for denying the application"; the Commission has, on the contrary, granted a number of exemptions where over 10% of the stock was owned.[12] The Commission did, however, give proper weight to the facts among others that North American held by far the largest block of securities in P. G. & E., amounting to 32.89% of the common stock and 17.71% of the voting

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[11] The petitioner's development of the argument indicates that it believes that the Commission, in order to deny an application, must make an affirmative finding that the applicant is "subject to a controlling influence." This ignores the structure of the "control" provisions of the statute, which place upon the applicant, who holds more than 10%, the responsibility for showing that it is not subject to such a controlling influence.

[12] The cases are collected in the Commission's opinion (R. 1928–1929 n.).

power, and that the next largest holder owned less than 2% of the securities, while the remainder was scattered. The fact that exemption is possible and indeed is necessary only when more than 10% is owned does not render the extent of ownership irrelevant.

The main quarrel of P. G. & E. with the Commission's findings relates to the interpretation of the statutory phrase "controlling influence" and its application to the facts of this case. The interpretation adopted by the Commission is completely in harmony with that approved by all courts which have dealt with this problem.[13] The Commission in this case, as in previous cases, interpreted the phrase "controlling influence" to require something less, in the form of influence over the management or policies of the company, than "control." The use of the term "control" in clauses (i) and (ii) in contrast to the phrase "controlling influence" in clause (iii) clearly supports this distinction. Section 2 (a) (8) contains no indication that active and overt exercise

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[13] *Detroit Edison Co.* v. *S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey* v. *S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co.* v. *S. E. C.*, 129 F. (2d) 794 (C. C. A. 2d); *American Gas and Electric Company* v. *S. E. C.*, 134 F. (2d) 633 (App. D. C.), certiorari denied, 319 U. S. 763; *Koppers United Co.* v. *S. E. C.*, 138 F. (2d) 577 (App. D. C.).

of control is the test,"[14] and the Commision concluded that latent power was sufficient. The application of this standard to determine whether a "controlling influence" exists has frequently been a troublesome question necessitating, as in this case, the most thorough exploration of historical and potential relationships between the companies involved. As the interpretation of the agency charged with the administration of this Act, the Commission's construction of "controlling influence" is entitled to[15] and has been given great weight.[16]

Petitioner's reference to the brief of the Commission in this Court in the *Electric Bond and Share Co.* v. *S. E. C.*, 303 U. S. 419, and to Senator Wheeler's statements in the course of the legislative debate are beside the point (Pet. pp. 6–11). These remarks were directed generally to the type of regulation which the Act provides rather than to precise definitions. Viewed in their context, these statments describe merely the more usual situations embraced by the Act and do not attempt to deal with all variations. Indeed,

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[14] In the original draft of the Act (H. R. 5423, 74th Cong., 1st Sess., 1935, p. 7; S. 1725, 74th Cong., 1st Sess., 1935, pp. 7–8), a subsidiary company was defined to include "any company over which such holding company *exercises* a material influence." (Italics added). The substitution in the final draft of the words "subject to" for the word "exercise" is of significance.

[15] *Gray v. Powell*, 314 U. S. 402, 412.

[16] See note 13, *supra*.

the legislative history shows that the phrase "controlling influence" was intended to provide flexibility in order to "meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take." S. Rep. 621, 74th Cong., 1st Sess., p. 23; H. Rep. 1318, 74th Cong., 1st Sess., p. 9.

3. Petitioner contends that the court erred in affirming the Commission's order by an equal division (Pet. p. 31). As we understand petitioner's argument, it is that the review proceeding in the Circuit Court of Appeals under Section 24 (a) of the Act is in the nature of an original determination of a justiciable controversy which must be decided for or against the petitioner by a majority of the court. Petitioner concedes (Pet. p. 33) that it is proper for an equally divided appellate court to affirm a *judicial* decision but urges a distinction with regard to decisions of an *administrative* tribunal. To support the argument, cases are cited which either involve the entry of a judgment in the first instance (*In re First Congressional District Election,* 295 Pa. 1, 144 Atl. 735 (1928)), or depend upon a statute which requires a majority of the judges of the court to issue any order, judgment or decree (*Deglow* v. *Kruse,* 57 Ohio St. 434, 49 N. E. 477 (1898); *In re Kings Co. E. R. Co.,* 78 N. Y. 383 (1879)). These cases are clearly irrelevant and petitioner's contention is without merit.

Under the provisions of Section 2 (a) (8) here involved—as distinguished from other types of statutes, and indeed certain other orders of the Commission under the Holding Company Act[17] — the orders of the Commission are self-operative. The petitioner was subject to the Act as a subsidiary of North American by force of the statute itself, and could be relieved of its responsibilities as such only on a Commission finding that it was "not subject to a controlling influence" by North American. The Comission's refusal to make such a finding left the statute operative as to petitioner unless the Commission's determination should be set aside on review.[18]

"Affirmance" by the reviewing court thus has no greater or different effect than a failure to set

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[17] It is unnecessary for present purposes to consider the effect of an equally divided reviewing court upon orders of the Commission under other provisions of the Act, or the possibly different problem which might be presented under such statutes as the original Federal Trade Commission Act and the National Labor Relations Act where sanctions for the administrative order are dependent upon a judicial decree of enforcement.

[18] The filing of an application in good faith under Section 2 (a) (8) serves by the terms of the section to exempt the applicant "until the Commission has acted upon such application." This statutory exemption thus terminated with the entry of the Commission's order here under review. The proceedings with respect to the *ex parte* "stay" of the Commission's order entered by the court below are described in note 21, *infra*.

aside or a dismissal.[19] In the review proceeding the burden is on the petitioner to establish his case, both because of his position as applicant for an exception under the statute and because of the weight given to an administrative determination.[20] If the judges of the reviewing court divide equally, the Commission's order cannot be set aside, for petitioner has not satisfied this burden. The situation is comparable to that of a single judge who finds the considerations in a case evenly balanced; he then decides against the party required to make an affirmative showing. Thus even if the case is not governed by the well-established rule applicable to appellate review of the decisions of a lower court, the result is necessarily the same. It should be noted that there is no indication of dissent below from the conclusion that an equal division among the judges as to the merits should result in affirmance of the Commission's order (R. 1776).

The differences of opinion among the judges of the Ninth Circuit in this case do not presage any

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[19] In *Detroit Edison Co.* v. *Securities and Exchange Commission*, 119 F. (2d) 730, 740 (C. C. A. 6), certiorari denied, 314 U. S. 618, the action of the circuit court of appeals sustaining the Commission's order took the form of merely denying the petition to review.

[20] This is true as to conclusions of law as well as findings of fact; the weight which this Court has ascribed to the former (*St. Joseph Stock Yards* v. *United States*, 298 U. S. 38, 53; *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 549) should prevent a court from setting them aside if it thought the considerations evenly balanced.

similar divergence of viewpoint in other cases. Both the Commission's decision and petitioner's contentions turn upon the facts of this particular case, and it cannot be assumed that an identical situation will again come before the court. For this reason the equal division of the court below is not in itself sufficient to warrant review by this Court.

Petitioner urges that certiorari be granted at least for the purpose of remanding to the court below for further consideration when the existing vacancy in that court is filled. This contention was made to the court below as a ground for the granting of a second reargument and on consideration was rejected. The exercise of its discretion by the court below in determining not to grant a second rehearing is clearly not subject to re-examination by this Court, except for abuse of discretion. In the light of the extended period during which the case has been pending,[21] no abuse can be claimed in putting an end to further prolongation of the litigation. See the discussion in

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[21] The petition to review was filed September 18, 1941 (R. 1671, 1695), and the second petition for rehearing was denied on February 23, 1944 (R. 1777). During this period and to the present time, the petitioner has not subjected itself to regulation under the Act because of an *ex parte* "stay" granted by the Ninth Circuit (R. 1696, 1777). The Commission's motion to vacate the "stay" was not passed on by the court in either of its decisions, on the ground that it had become moot (R. 1703–1704).

Brown v. *Aspden's Adm'rs,* 14 How. 25, 27, 28.[22]

4. Petitioner argues (Pet. p. 33) that the court below, in affirming by an equal division, left "outstanding" an "obviously erroneous" opinion by a majority of the court on the first hearing. This conclusion is incorrect. The first opinion is not in any sense "outstanding." [23]

The history of the proceedings affirmatively indicates that the novel views of the court on the first hearing were abandoned. The first opinion below (R. 1699–1718), after reviewing the facts and concluding that the Commission's finding as to "controlling influence" was adequately sup-

[22] That case, decided by an equally divided court, contains the following remarks on that subject which are pertinent to petitioner's contentions:

> And if it is to be undertsood, that cases of this description are not to be finally decided without the concurrence of a majority of the whole bench, it would be an useless consumption of time to hear them in the absence of any one judge, because it would be uncertain whether a judgment could follow after the argument. And it is easy to foresee the inconvenience, delay, and expenses to which a practice of that kind would subject the parties, and the uncertainty and confusion it would produce * * * in the order of business as it stands on the docket of the court.

[23] By granting a rehearing the Court vacated its judgment and undertook a fresh consideration of the case. *Hook v. Mercantile Trust Co. of N. Y.*, 95 Fed. 41 (C. C. A. 7th); *United States* v. *A. Bentley & Sons Co.*, 293 Fed. 229 (C. C. S. D. Ohio).

ported in fact and in law (R. 1699–1713),[24] p
ceeded to construe the "public interest" langu
in clause (iii) as creating a separate fourth
quirement rather than as a part of clause (
(R. 1713–1718).[25] The latter construction
not been adopted, briefed or urged by the C
mission, and that fact was expressly made
ground for granting the rehearing (R. 17
Since the Commission did not undertake to s
port it on the rehearing, and since the co
failed to reaffirm it after the final hearing, it m
be deemed abandoned and without any pres
significance.[26] Particularly in view of the C
mission's position, it is clear that the superse
opinion can no longer be regarded as author
tive in this respect, much less as the source
confusion urged by petitioner.

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[24] This portion of Judge Haney's opinion contains, in
view, an excellent discussion of both the law and the f
of the case.

[25] It should be noted that petitioner does not in its peti
for certiorari challenge the Commission's application or
struction of the "public interest" clause in Section 2 (a)

[26] Further evidence that those judges of the Ninth Cir
who voted to affirm the Commission's order did not ac
the comments made in the earlier majority opinion conc
ing the construction of the "public interest" provisions
pears from Judge Garrecht's dissenting opinions. In
earlier dissenting opinion Judge Garrecht vigorously
tacked this construction (R. 1737, 1738), while in his dis
from the *per curiam* order (R. 1741–1775) he confines h
self to arguing that there is no evidence to support
Commission's conclusions with respect to control
influence.

CONCLUSION

On the merits, the decision below is correct and there is no conflict. The decision turns largely on the facts. Furthermore, the great bulk of the exemption cases under Section 2 (a) (8) have by now been decided; no such cases are now in the courts and only a few applications, most of them of minor importance, are still pending before the Commission. The divergence of opinion among the judges of the Ninth Circuit is thus not likely to affect other cases.

There can be no doubt, in view of the nature and effect of the order under review, as to the correctness of the refusal of the court below, when equally divided, to set aside the order. In any event, if certiorari were granted, disposition of the case on the merits by this Court would render moot the question as to the propriety of the three to three decision.

Accordingly it is respectfully submitted that the petition for a writ of certiorari be denied.

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APPENDIX

The pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C., Sec. 79, *et seq.*, are printed at pages 1–14 of the appendix to petitioner's brief. Section 2 (a) (8), upon which this case turns, reads as follows:

> SEC. 2. (a) When used in this title, unless the context otherwise requires—
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> * * * * *
>
> (8) "Subsidiary company" of a specified holding company means—
>
> (A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and
>
> (B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or con-

sumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies.

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying

or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

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